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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 697

WILLIAM C. McDOUGALL,

Petitioner,

vs.

UNITED STATES CIVIL SERVICE COMMISSION, INDIVIDUALLY AND OFFICIALLY, CONSISTING OF ROBERT RAMSPECK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

WILLIAM C. McDOUGALL,
Petitioner Pro Se.

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WILLIAM C. McDOUGALL,

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UNITED STATES CIVIL SERVICE COMMISSION, INDIVIDUALLY AND OFFICIALLY, CONSISTING OF ROBERT RAMSPECK, JAMES M. MITCHELL, FRANCES PERKINS,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

William C. McDougall, in his own behalf, prays that a writ of certiorari issue to review the judgment entered in this case on February 5, 1953, by the United States Court of Appeals for the District of Columbia.

Opinion Below

The memorandum opinion of the District Court (R. 57) is not reported. The opinion in the Court of Appeals (R. 59) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1953 (R. 59). The jurisdiction of this Court is invoked under Sect. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether a person inducted into the military service of the United States during World War I and assigned to Camp Humphreys, Va. for full-time training and full-time duty, being thereby disrupted in his economic and social life, and being discharged under honorable conditions after seventeen (17) days of service for physical disqualification, and, having been paid the statutory military pay at time of discharge and later was paid $60.00 additional military pay, is entitled to preference in federal employment within the meaning of the Veterans' Preference Act of 1944?

Statutes Involved

The pertinent portions of the statutes involved are set forth in the appendix (*infra*, p. 11).

Statement

Appellant was inducted into the military service of the United States on June 15, 1918 from Local Board for Division No. 12, Pittsburgh, Pa. He was sent to Camp Humphreys, Va. for training and there performed full-time duty at the disposal of military authorities which included drilling, digging trenches, guard duty, work details and bayonet practice. On July 1, 1918 he was discharged from the military service and issued form No. 638, A. G. O., "Discharge from Draft", which is dated June 28, 1918 on the face of the form and on reverse side same shows, "Paid in Cash $25.30, June 28, 1918, Paid in full, Jul. 1, 1918" (R. 6, 7, 8, 9).

Appellant's veteran's preference was recognized by Appellees or their agents from June 11, 1947 to April 6, 1950 on VA forms 5-3855 or Standard Form 50, United States Civil Service Commission (Plaintiff's Exhibits 2 to 7, inclusive) (R. 10 to 21).

Appellant's non-entitlement to veteran's preference is shown on Standard Form 50, United States Civil Service Commission dated April 7, 1950 (Plaintiff's Exhibit 8) (R. —), and same shows A-2 retention category and furlough on account of reduction in force, notwithstanding an efficiency rating of "Very Good" and total service in civilian capacity in excess of twenty-three (23) years, which, with veteran's preference, warranted the assignment of retention points in excess of several other civilian employes retained in employment in the same occupational classification.

Appellant appealed from revocation of his veteran's preference and decision by Board of Appeals and Review of the United States Civil Service Commission dated September 7, 1950 holds he is not entitled to veteran preference under Sect. 2 of the Veterans' Preference Act of 1944, as amended, unless the Department of the Army should certify, "that you did serve on active duty and was discharged under honorable conditions therefrom" (Plaintiff's Exhibit 9) (R. 24, 25).

Specification of Error to be Urged

The Court below erred:

1. In holding the principles of *Patterson* v. *Lamb* (329 U. S. 539) and *Mitchell v. Cohen* (333 U. S. 411) apply.

2. In failing to give effect to the plain intent of Congress, as disclosed by the legislative history of the Veterans' Preference Act of 1944 as to type of ex-serviceman intended to be entitled to the benefits of the Act.

3. In failing to hold the appellant is a veteran or ex-

serviceman within the meaning of the Veterans' Preference Act of 1944.

4. In affirming the judgment for respondents.

Reason for Granting the Writ

1. The Court below has given improper effect to the decisions rendered in the cases of *Patterson* v. *Lamb* (329 U. S. 539) and *Mitchell* v. *Cohen* (333 U. S. 411).

In the Lamb case he received his notice to report for induction on November 11, 1918. Said notice was cancelled before he entrained for military training camp. In the language of this Court he, "got no farther than his local board". In his action he sought to compel the issuance to him of an Honorable Discharge in lieu of a "Discharge from Draft". The Court there held the War Department was within its power in granting a "Dischage from Draft".

In the Cohen case he was a member of the Volunteer Port Security Force of the Coast Guard Reserve; he retained his normal civilian employment; he received no military pay; he could be disenrolled at his own request and could not be transferred away from his home without his consent.

In contrast with the above cases, the appellant was inducted June 15, 1918 and arrived at Camp Humphreys, Va. on June 16, 1918; he there performed full-time duty at the disposal of military authorities such as drilling, work detail, guard duty and bayonet practice until July 1, 1918 when he was discharged from the military service and issued form No. 638, A.G.O., Discharge from Draft, for physical disqualification and paid $25.30. Said payment represented statutory pay and transportation cost for return home and cost of one or two meals enroute.

The appellant does not find any prior decisions by your Honorable Court where the facts are in point. However, in the case of *Hurley* v. *Crawley*, 50 Fed. (2nd) 1010, 60

App. D. C. 245, decided by the Court of Appeals for the District of Columbia, the facts are most nearly analogous. Crawley was inducted on September 2, 1918; arrived at camp on the following day, September 3, 1918; was hospitalized from September 4, 1918 to September 26, 1918; served as an orderly at base hospital until October 3, 1918 and was again hospitalized on account of sickness until November 9, 1918 when he was discharged from the military service and issued "Discharge from Draft". His total active duty was seven (7) or eight (8) days. It was held in the above case that Crawley was a, "Soldier, ad interim, as respects civil service preference".

2. The necessity for legislation to assure draftees and enlisted men of re-employment with the Federal government upon their return to civilian life was recognized by the Congress in the enactment of the Selective Service and Training Act of 1940 (54 Stat. 885, C 720), Sect. 8(b)-"A) provides,[1] that, "—in order to perform such training and service has left or leaves a position—such person shall be restored to such position or to a position of like seniority, status and pay."

The Veterans' Preference Act of 1944 (appendix, infra p. 11) was later passed and embodied the same principles. The reports of the House and Senate Committees on Civil Service on the legislation[2] stressed the general re-employ-

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[1] Selective Service and Training Act of 1940, 54 Stat. 885, C 720. Sect. 8(b) In the case of such person, who, in order to perform such training and service has left or leaves a position in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within forty days after he is relieved from such training and service—(A) If such position was in the employ of the United States Government, its Territories or possessions, or District of Columbia, such person shall be restored to such position or to a position of like seniority, status and pay.

[2] H. R. 4115, 78th Congress, 2nd session, which became the Veterans' Preference Act of 1944, for the first time brought together in comprehensive statutory form the various statutory provisions, Executive Orders and regulations conferring on veterans special federal employment benefits and privileges (H. R. 1289, 78th Congress, 2nd Session, P-1; S. Rep. 907, 78th Cong., 2nd Session, P-1: 90 Cong. Record 3502, 3505). The bill was

ment and rehabilitation benefits provided by the bill for those whose normal employment and mode of life had been disrupted by their service in the armed forces. Congress intended to preserve and expand preference rights theretofore conferred upon veterans of prior wars.

The debates in Congress with their repeated references to "re-employment", "when the soldier returns who has been willing to fight for his country on the fighting front", and "when they return from the service" (90 Cong. Record 3502, 3504, 3506) reflect a clear Congressional purpose to confer employment preference only on those veterans who gave up their normal pursuits and surroundings and freedom of movement to the demands of military service.

Among the benefits which the said Veterans' Preference Act confers on such honorably discharged veterans (or those discharged under honorable conditions) is the one that in, "certification for appointment, in appointment, in re-instatement, in reemployment, and in retention in civilian positions" in the Government, preference shall be given to "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States during any war—and have been separated therefrom under honorable conditions".

3. The decision below holds the appellant is not an ex-serviceman within the meaning of the Veterans' Preference Act of 1944.

In ordinary usage, the words "ex-serviceman" or "veteran" as those terms are commonly used with reference to

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reported to the House on March 27, 1944 (90 Cong. Record 3156; H. R. No. 1289, 78th Cong., 2nd Session) and passed the House on April 7, 1944 (90 Cong. Record 3507). Hearings were held before the Senate Committee on May 17 and 23, 1944 (Hearings before the Committee on Civil Service (Senate) on S-1762 and H. R. 4115, 78th Congress, 2nd Session) and the bill was reported to the Senate on May 25, 1944 (90 Cong. Record 4959; S. R. 907, 78th Cong., 2nd Session). As amended, it passed the Senate on June 12, 1944 (90 Cong. Record 5785) and was approved on June 27, 1944 (90 Cong. Record 6712).

a person who has served in the armed services of the United States, connote one who enlisted, volunteered, was mustered, or was inducted, into the armed services of the United States; while serving in wartime was on full-time active military duty; was entitled to receive statutory military pay and allowances from the time of his entry into the armed services until his separation therefrom; was at all times subject to military orders and discipline, and, during his period of service, did not form a part of the civilian community. It is in this accepted sense that the Congress makes provision for the granting of gratuities and other benefits to ex-servicemen.

There are certain benefits under the Veterans Administration where the veteran or ex-serviceman is defined as a person who has served ninety (90) days or more.

Under the World War Adjusted Compensation Act of May 19, 1924, 43 Stat. 122, U. S. C. Title 38, sect. 501, it is provided, "The amount of adjusted service credit shall be computed by allowing the following sums for *each day of active service, in excess of sixty days, in the military or naval forces of the United States* after April 5, 1917 and before July 1, 1919", etc. (emphasis supplied).

Under "Definitions" of said World War Adjusted Compensation Act, sect. 2, provides, (a), The term "veteran" includes any individual, member of the military or naval forces of the United States at any time after April 5, 1917 and before November 12, 1918, but does not include (1) any individual at any time during such period or thereafter separated from such forces under other than honorable conditions, (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform, or (3) any alien at any time during such period or thereafter discharged from the military or naval forces on account of his alienage.

No formula or minimum service requirement was specified under the Revenue Act of 1918, 40 Stat. 1151, Sect. 1406, which provides:—

> "That all persons serving in the military or naval forces of the United States during the present war who have, since April 6, 1917, resigned or been discharged under honorable conditions—shall be paid, in addition to other amounts due them in pursuance of law, $60 each".

The appellant was paid said $60.00 in addition to the statutory military pay as shown on his "Discharge" from the military service, Plaintiff's Exhibit "One", Part I. (R. 6, 7).

No formula or minimum service requirement was specified under the Veterans' Preference Act of 1944.

If the decision below is permitted to stand it would result in an unjust discrimination against men inducted during W. W. I and discharged from military service at military training camp for physical disqualification incurred prior to induction, as such men were issued a "Discharge from Draft" on form 638 A.G.O. by Order of Secretary of War dated January 12, 1918,[3] instead of the regular Honorable Discharge on Form 38, A.G.O.

Under the Selective Training and Service Act of 1940, 54 Stat. 885, the statute prescribed the issuance of a certificate of satisfactory service upon completion of said training, unless sooner discharged.[4] Thus it would appear

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[3] *Davis* v. *Woodring*, 111 Fed. (2nd) 523, it was held: "While therefore we have no hesitation in holding that Petitioner was a soldier of the United States—and he served under honorable conditions—cannot interfere with internal management of War Department."

[4] Selective Service and Training Act of 1940, 54 Stat. 885, C 720, Sect. 3(a): Provided further, that no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service has been satisfactorily determined.

Sect. 3(b): Each man inducted under the provisions of subsection (a)

if the appellant's service were rendered during W. W. II instead of W. W. I he would have been issued the Certificate of Satisfactory Service [5] and said Certificate, being an Honorable Discharge, would be acceptable to the United States Civil Service Commission showing entitlement to veteran's preference as appears in the last paragraph of decision of Board of Appeals and Review of said United States Civil Service Commission shown as Plaintiff's Exhibit "nine' (R. 24), as follows:—

> "In view of all the facts of record in your case, it is the opinion of the Board of Appeals and Review that you are not entitled to veteran preference under Section 2 of the Veterans' Preference Act of 1944, as amended, *unless the Department of the Army should certify that you did serve on active duty and was discharged under honorable conditions therefrom*". (Emphasis supplied).

Your appellant was entitled to receive and did receive statutory military pay from the time of his entry into the armed services until his separation therefrom; was at all times during said period subject to military orders and

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shall serve for a training period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interest of national defense.

Sect. 8(a): Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3(b) shall be entitled to a certificate to that effect upon completion of such period of training and service", etc.

[5] In appellant's employment as Rating Specialist, Legal, at Regional Office of the Veterans' Administration, Pittsburgh, Pa., it was an incident to said employment to carefully examine the service records of thousands of ex-servicemen filing claims, and, in hundreds of cases it was found inductees were discharged at military training camps after seven to thirty days of service for disability, physical, organic or mental, which was shown in their respective discharges as E.P.T.I. (Existed prior to induction) and in all cases were issued the regular discharge form in use during W.W. II, to wit, Form 53, Honorable Dicharge.

discipline; he was disrupted in his economic and social life during said period of military service, being on full-time duty at Camp Humphreys, Va.; he received at time of discharge from service $25.30 which included statutory military and he received and was entitled to receive the additional military pay of $60.00 payable only to ex-servicemen under the provisions of the Revenue Act of 1918, 40 Stat. 1151, Sect. 1406, approved February 24, 1919, as appears on appellant's "Discharge". (Plaintiff's Exhibit "One", Part I (R. 6, 7).

The appellant meets all the requirements of the Veterans' Preference Act of 1944 as to the type of ex-serviceman intended to be entitled to benefits thereunder.

For the reasons stated I submit that the decision below is so far-reaching as imperatively to require review by this Court.

Conclusion

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX I

Selective Service Act of May 18, 1917, 40 Stat. 76.

Par. 7, Sect. 2—(in part) *All persons Drafted into the service of the United States* and all officers accepting commissions in the forces herein provided for *shall, from the date of said draft* or acceptance, *be subject to the laws and regulations governing the Regular Army,* except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and *those drafted shall be required to service for the period of the existing emergency unless sooner discharged.* (Emphasis supplied).

Veterans' Preference Act of 1944, 58 Stat. 387, as amended, 5 U. S. C. 851, Section 2 thereof, as follows:

Sect. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and *in retention in civilian positions,* in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, *preference shall be given to*—(4) those ex-servicemen and women *who have served on active duty in any branch of the armed forces* of the United States, *during any war,* or in any campaign or expedition (for which a campaign badge has been authorized), *and have been separated therefrom under honorable conditions*:—. (emphasis supplied).